Roberts Owen

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Zachary M. Schrag, Interviewer

Transcribed by Doug Wilson

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Schrag: Zachary Schrag is interviewing Mr. Roberts Owen. It is July 19, 2000, and we are in his office in Washington, D.C. It is a little past ten o'clock in the morning.

I'd like to start with your background -- where you were born, where you grew up. Were you from this area originally?

Owen: No. I grew up in Cambridge, Massachusetts.

Schrag: And you stayed there through high school and college?

Owen: I went off to New Hampshire to go to school. Then I went in the U.S. Navy for three years. Then I returned and went to Harvard for two years. Then I went to the Harvard Law School for three years. Then

I had a soul-searching decision as to whether to live in Boston, my old home, or whether to move to Washington. I decided to move to Washington on the understanding I would move back in two years, and I never made it back.

Schrag: What brought you to Washington originally?

Owen: The opportunity to work with one of the major league law firms on public policy issues.

Schrag: Was that this firm, Covington & Burling?

Owen: Yes.

Schrag: What was the firm’s focus at the point that you joined? Obviously Covington & Burling shows up all through this story with the various appointments. I’m trying to learn a little more about the firm’s history.

Owen: The firm at that time was -- casting modesty to the winds -- it was the biggest and sort of most prestigious firm in Washington. It had a terrific record in terms of pro bono work. It had a lot of very skilled litigators. Peter Craig had worked here as an associate for a period of time, and when the whole freeway controversy arose and he thought perhaps litigation might be one way of stopping the

freeway project, he came to us and asked if we would do it on a pro bono basis. We did. We wound up spending four thousand lawyer hours stopping the freeway project.

Schrag: As I understand it, in the 1950s there was --

Owen: Pro bono, I should have said.

Schrag: Yes. There was a lot of transportation work being done for paying clients. That is, you had airlines as clients and railroads, too, as I understand. But was that still just a relatively small part of the firm's business as a whole?

Owen: I can't really tell you how big. I think that was a substantial part of the firm's business -- American Airlines and a whole lot of railroads, the Southern Railroad and so forth. I think we were significantly involved in the transportation business, but I personally had not been.

Schrag: Had you been involved in other regulatory work?

Owen: Oh, yes. I started here in 1952 as an associate interested in litigation. I have been doing litigation for whatever that is, forty-five years, litigation of every kind. I'm a general litigator,

dealing with trying cases in the federal courts and trying cases before federal agencies and so forth.

Schrag: There are a number of Covington & Burling people who show up in the story, so I just wanted to know if you had any relationship with these people or anything that could elucidate their character. The first is Peter Craig. How well did you know him while he was here?

Owen: Not terribly well, but I knew him on a friendly, social basis. We had never worked together before, but I knew Peter.

Schrag: What about Ed Seeger?

Owen: Ed Seeger? Was he involved at all?

Schrag: Ed Seeger became the general counsel of the National Capital Transportation Agency.

Owen: I totally forgot that. I did not -- again, I knew Ed Seeger when he was here. He was not a close companion in any sense. I don’t think of him as playing any role whatever in the situation, but you may educate me otherwise.

Schrag: I'm just not quite sure how these connections go, that's why I'm asking. The next one is Gerry Levenburg. He was here, correct?

Owen: Yes, but again, I don't think of him as having anything to do with this story.

Schrag: He was on the National Capital Transportation Advisory Board as its last chairman. So in the mid-1960s when rapid transit shifted from a federal to an interstate compact responsibility, he played a role actually fighting that shift. Covington & Burling keeps on coming back, so I was trying to get a --

Owen: That's interesting. I never focused on that fact before either.

Schrag: So you weren't aware that all these people were getting -- I guess here's my question. When [John F.] Kennedy came in, certainly from the transportation perspective it seems like the Kennedy administration starts picking all of these people out of the firm to go into the government. Was that your impression?

Owen: No, it is not.

Schrag: How many lawyers were there around 1960?

Owen: In 1960 we were probably -- I'm guessing -- a hundred lawyers.

Schrag: So you could lose five people to this and not even notice that they were gone necessarily.

Owen: I frankly never thought of those people as having -- well, I knew they all departed, but it seemed to me for unrelated reasons. I had no concept that they were going off to transportation problems. That's interesting. I don't think it's significant, but I may be wrong.

Schrag: A hundred lawyers is a pretty big firm for that day, right? Today it's medium.

Owen: Yes. It was the biggest firm in town.

Schrag: Ed Burling -- he also, actually under the [Dwight D.] Eisenhower administration, had a small post briefly. He was -- was he still working full-time around the late 50?

Owen: Yes. He was here spending time at the firm. I had forgotten that he had a post in the Eisenhower administration. I think of him as being involved in Republican politics but not as a federal employee.

Schrag: This was, again, on an advisory board, so it would not have been a very frequent position. I'm trying to understand how Eisenhower picked his people. So he was an active Republican?

Owen: Yes.

Schrag: Okay.

Owen: I don't think of him as having any interest at all in transportation matters, but again, I could be wrong.

Schrag: What about in the politics of Washington in general? Was he active?

Owen: I'm not sure how active he was in local Republican politics, but he certainly was a big supporter of the Republican Party nationally. I think he was chairman -- maybe he was chairman of the local Republican committee. I'm not sure. You'll have to talk to him about it, since I'm a Democrat.

Schrag: Then the last name was Charles Horsky. Did you know him at all well?

Owen: Yes, very well indeed. He was Lyndon Johnson's DC person.

Schrag: And Kennedy's.

Owen: And Kennedy’s too, quite right. It started with Kennedy. Yes. I knew him pretty well indeed, sure. He was -- I never worked with him on any of these problems. I worked with him in a totally different context, different times. But, yes, he was there in the White House.

Schrag: While he was here he was also head of the DC -- what is it? -- housing -- I’ve lost the name now -- but some volunteer organization trying to get better housing. My impression is that that was his main cause.

Owen: I think that’s right. I think that’s right. I mean, while in the White House he was responsible for DC affairs generally, but housing was a particular personal interest of his.

Schrag: Did that correspond with his work here at the firm, or was he working on all sorts of --

Owen: No, he would have done all kinds of things at the firm, I think, but he was one of these people who devoted an unusually large portion of his time to pro bono work. He was a very civic-minded person who was chairman of all kinds of committees and so forth

in the community. One of his interests was low-cost housing for the poor.

Schrag: Do you remember any of his particular pro bono efforts?

Owen: Oh, gosh. We could get you, I'm sure, a résumé of his career. He was one of the leading civic leaders in this community and probably the best-known pro bono lawyer in Washington in his day. He was chairman of everything under the sun, all good works.

Schrag: Okay. That's very interesting.

Owen: He was remarkably public-spirited.

Schrag: I sort of focused on the housing aspect just because that's probably the affiliation he gave at some congressional hearing that I came across.

Owen: I think housing was of particular interest to him, but he had a lot of other interests as well.

Schrag: The other nexus -- that's one nexus, is Covington & Burling. The other one is Cleveland Park. You live on Newark Street. Peter Craig is on Macomb Street.

Owen: It sounds like a vast right-wing conspiracy.

Schrag: Or a left-wing conspiracy. It’s really remarkable, if you mapped out all of this. When did you move to Cleveland Park? Was that when you first came down?

Owen: 1966.

Schrag: Okay, so much later. Where did you live when you first arrived in Washington?

Owen: Georgetown. I was a bachelor and lived in various Georgetown pads for a period of years.

Schrag: I see. Did you have contact with the whole Kennedy crowd at that point?

Owen: I was just a plain old hard-working litigator at Covington & Burling. I was not politically connected. I was not, as a private person, particularly interested, no more so than, I guess, other members of the public, in these issues until Peter Craig came to us with this possibility of challenging the legality of the various projects in the freeway. At which point, as a litigator, that looked like a dream case.

Schrag: So you hadn’t been active in any of these committees or marching against the Northwest Freeway. This was just something that came in.

Owen: Yes.

Schrag: Why was it so appealing?

Owen: I liked to litigate against the government. I enjoy finding mistakes within the federal establishment and going after them and correcting them. When I first began talking to Peter, his description of the cavalier approach that the DC Government and the Federal Highway Administration were taking toward this freeway program just sort of -- I won't say made my blood boil, but it seemed outrageous and it seemed like a terrific litigating project and a good pro bono effort, so I got interested.

Schrag: Fascinating. This is quite the hub of -- because from the written record you just sort of appear and it's not clear who you're working for with twenty-two plaintiffs. But just to back up, were there other previous experiences like this, any particular favorite attacks on the government -- on government malfeasance, I should say.

Owen: I can't remember the order of events. I have attacked the government fairly often. Probably one of the most well-known cases, although you would not have heard of it, was something for the Medical

Committee for Human Rights where we attacked the Securities and Exchange Commission's procedures with respect to shareholder proposals. Dow Chemical had refused to allow shareholder proposals to appear in their proxy materials relating to the manufacture of napalm. So the shareholders didn't get a chance to vote as to whether the company would continue to manufacture this terrible product. The SEC sort of waved us aside, so we sued them, and bang, that was it.

Schrag: It was sort of the thrill of the fight, that David against Goliath.

Owen: Yes. To be a good litigator you have to have a slightly immature competitive instinct. I have that, or did in those days.

Schrag: So when Peter Craig comes up to you and says, "Let's take on the Department of Transportation," and you say, "That sounds like fun," what steps did you have to take within the firm to persuade them to devote your time and other professional time, staff time?

Owen: I don't think any of us anticipated how much time it was going to take. I can't remember whether we had a pro bono committee or something at that time. We do

now. In order to take on a pro bono case now you have to get approval. People think about the pros and cons of the particular project. My recollection is that I went to one or two people on the management committee and just said, “Hey, this is something I want to do,” and they said, “Go to it.” It was a very informal spirit in those days.

Schrag: I imagine with this four thousand hours of legal time, that included other people. I mean, this case went at least to the point of petitioning for cert by the federal government. This went all the way up and down a few times. So you had other people working with you?

Owen: Essentially one other person, Jerry Norton Norton. He and I sort of -- I guess I was the boss and he was number 2 -- together on all four thousand hours. We made a very good team and we made the federal government bend down. It was very pleasing.

Schrag: The case shows up, of course, as DC Federation of Civic Associations et al., with, again, twenty-two plaintiffs. Could you describe the roles of these various plaintiff groups? That is, did you launch

the suit and then these people show up and say, “We want our names on it, too.” What were they --

Owen: Peter Craig would remember more about this than I do. My recollection is that he came in and said, “There are a number of civic organizations that want to be party to the suit.” I think he, in effect, said, “I will go out and get them organized and bring as many together as I can.” We then -- I remember having a debate as to how to style the case in terms of the caption that would appear in the reports. We decided to put the DC Federation of Civic Associations out front because that was the sort of all-encompassing body and would take in most of the subsidiary groups.

I had not much contact with any clients except -- I’m sure there were more than I’m about to describe, but two stand out. One is using Peter Craig as a fact consultant. He had done an enormous amount of factual research and knew exactly where these projects were going to be built and what the pros and cons were and so forth. The other major client contact was that there was a wonderful little Brookland civic association. I’ve forgotten what it was called -- Brookland Homeowners Association or

something. Brookland is a very pleasant middle-class black community over here. There was one old gentleman who was a member of the Brookland association. He showed up at every court hearing and every day of trial. Every day he came to me and said, “Good morning,” and wished me well. At the end of the day, every day, he came and said he thought the case was going well. He was a constant supporter, and he was the principal client contact. Craig, in a sense, was not a client.

Schrag: Why not?

Owen: I mean he was not a person I was representing. [tape distortion].

Schrag: -- pro bono case, and you know who the client is. It sounds like you were taking most of your policy direction -- well, I guess I should rephrase that. That is, once Peter Craig pressed “Start,” would you go back for questions of strategy, like “do we appeal this,” or were you pretty much on your own?

Owen: My recollection is Peter Craig did not consider himself primarily a litigator. I think we worked out basically the strategy talking to him. Before major moves were made, I’m sure we said to him, “This is

what we think we want to do. Is that okay?" [tape distortion].

Schrag: It sounds like you did not have any comparable contact with, say, Sammie Abbott and the -- this is just sort of what I need to clarify, because certainly from the congressional hearings record, for example, there is a Northwest Committee of 100, primarily white professional groups fighting the Three Sisters bridge. There are up in far Northwest, Northeast, Takoma Park, there are these groups fighting the North-Central who are much more radical. They go into the hearings. You did not have -- and they're on the case as, to some degree there, as named plaintiffs, but you did not have the same contact with them. [tape distortion]

Owen: [tape distortion] Right. As far as -- I mean, Peter was, I guess, a representative of the committee of 100.

Schrag: Oh, yes.

Owen: -- have anything to do with Sammie Abbott -- towards these people. I read about about them, how they succeeded in stopping the freeways, which is one way

of looking at it, I suppose. But I didn't have any contact with them.

Schrag: That's very helpful to clarify. Did you have any contact with the DC City Council, which was, of course while all of this was going on, Natcher was saying, I won't release subway funds until you settle this, and they're saying, "We can't control Covington and Burling," which sounds plausible to me.

Owen: That's true. I never had anything to do with them. I never had any contact with them. I had contact with, in an adversarial sense, the DC commissioners, the three-person group that ran the District before Home Rule. I deposed one of those people and had a long altercation with him about what his rights and obligations were and so forth. But I don't think I ever had anything to do with any city council member. They were not involved in a litigation context.

Schrag: Right. I need to talk to some of those people next. In a sense, they were being tossed about between -- you had [William H.] Natcher on the one end, whom they couldn't control, and you on the other end,

whom they couldn't control. Natcher was saying, "You have to build this bridge," and you were saying, "You can't build this bridge," and the DC City Council was saying, "We really can't please either side."

Owen: Yes. Looking back on it, they were in a vise.

Schrag: Did you pity them or did you just feel that you needed to do what was right?

Owen: Well, the latter, as between those two alternatives. When we looked at the case, it became very clear that this was a case of Federal Highway Administration sort of oozing out and expanding its jurisdiction and doing more and more freeway projects without complying with the law. They are highway builders; they like to build highways. Given the chance, they'll build a highway in an infinite amount of space, including parkland. They were not following the statute [tape distortion]. It was a wonderful [tape distortion]. But secondly, it was going to work out as [tape distortion], at least that was the hope [tape distortion]. They're just ignoring the laws of the United States in their own province. The highway laws have provisions to

protect citizens and the environment. They just paid no attention to them.

Schrag: It sounds like you were more focused on the federal rather than the DC officials.

Owen: Right.

Schrag: Did you see this as a case with national implications?

Owen: I saw it as a case where, if there were relevant statutes which arguably had been violated, they were federal statues. The violations of law occurred not really -- I guess there were some violations of District law, but basically it was a question of federal officials violating their federal obligations. The federal institutions were the principal defendants and the principal wrong-doers.

I think, as I remember, technically the Federal Highway Administration does not undertake any project, interstate freeway project, that is not requested by the local community. But in many cases -- and I've had some other highway cases as well -- the local government is approached by the Federal Highway Administration who says, "We would love to build a humongous big highway right through your community,

and it will have all these wonderful benefits for you. All you have to do is ask us, and we'll do it." So the local government says, "Okay." Then all hell breaks loose when the federal government fails to comply with federal statutes. That's essentially, I think, what happened here.

Schrag: The contrast here is that a lot of the people who end up fighting the highways were living in neighborhoods that were directly threatened by this. That includes Sammie Abbott. That includes Peter Craig in the 1950s and then others who lived along the banks of the Potomac who didn't want to see this bridge and these ramps.

Owen: Including Judge [John J.] Sirica.

Schrag: Judge Sirica lived [where]?

Owen: In the Macarthur Boulevard area.

Schrag: I didn't realize that, because I knew that Justice [William O.] Douglas --

Owen: I could tell you some funny sea stories about Judge Sirica and his attitude toward the project before and after he learned that he was going to be directly affected.

Schrag: I'd love to hear them. Do you want to tell those?

Owen: At some point. I won't interrupt your flow.

Schrag: Well, the general technique it to get the story first and then go back.

Owen: I can tell you that during -- you remember there were two separate litigations, Chapter A [and] Chapter B. In Chapter B, the second go-round, we made motions for summary judgment before Sirica, who, as you know, later became a "distinguished" judge. He just wiped us off the map. He just treated our position as ridiculous. We went to the Court of Appeals, and the Court of Appeals reversed and said, "No, you've got to go to trial on this one." So we had a six-week trial. [Mr. Owen later indicated that he was unsure of the exact length of the trial, writing, "Perhaps say simply 'we had a trial of several weeks.'" —ZMS]

For the first three weeks or so, Sirica a) did not really understand what the case was about, and b) did not think he was going to be affected personally. Somewhere along during the case, I found an opportunity to let him know that if the bridge was built, and the ramps and interchanges that connect

on both ends of the bridge were to go ahead as preliminarily planned by the Federal Highway Administration, he would not be able to drive to work by his ordinary route. I'm not sure -- I can't say that there was a cause and effect there, but shortly thereafter he began to take a much greater interest in the case and a much more hospitable view of our position. That's that.

Schrag: Fascinating. Okay. To get back where we were, did you ever have any personal interest in where the highways would go, where the bridges would go, whether the gorge would be despoiled, or was this just a question of --

Owen: Well, I felt that Craig was right on sort of the basic policy issues, and I was sympathetic. I would be regarded as a liberal Democrat and I am very much opposed to paving over federal parks and running huge highways through cities, so that on a personal level I thought this was a very sympathetic case. I did not spend a lot of time focusing on the policy desirability or lack thereof of specific projects. [tape distortion]. I just thought this whole plan is crazy, we ought to stop it, it's illegal, and here

we go. As you get into litigation, you become more and more focused and more and more interested. I got very interested in the bridge itself, but that was sort of after the fact.

Schrag: Let me get into the subway blackmail issue, because that's how it leads to the story. First of all, you said that the DC City Council never approached you and asked you to stop this so that they could go ahead.

Owen: I don't think so.

Schrag: Did you have any contact with the [Washington Metropolitan Area] Transit Authority, which was also --

Owen: No. I don't think so.

Schrag: Okay. What about with any members of Congress?

Owen: No. No contact.

Schrag: So you were just on your own.

Owen: I'm just a litigator.

Schrag: It's an amazing thing about American government, that someone can just do that without -- yes. That's what the right of petition is all about, I suppose, is that you don't have to --

Owen: That's what the rule of law is about. I used to read reports of what Natcher was saying in newspapers and so forth. We had some struggles during the litigation in efforts to get our hands on papers that he had written, letters that he had written, and so forth. We got some of them. So I was interested in what he was doing in the outrageous sort of bribery that he was engaged in, but I didn't talk with him about it.

Schrag: What about -- almost more outrageous than the bribery is this writing [John] Kluczynski's amendment, saying "Ignore any court decision; build the darn bridge." Did you ever have that experience or expect that experience of having one of your legal victories overturned or tried to be overturned by an act of Congress?

Owen: I wasn't too surprised. I've never had that experience before nor since. I wasn't too surprised because -- well, obviously, Natcher and company were outraged by the result of the first case. They thought they were writing a statute which said, "Build that bridge regardless." In fact, they wrote a statute which said, "Build that bridge regardless,

but comply with the provisions of Title XXIII." That gave us our -- when we first looked at the statute, we said, "Whoops, we're all done." Then we read the next few words, and here we go again.

Schrag: That's great. Were there other moments when you thought -- well, in the long haul, about '66 or '67 -- when did this start?

Owen: I had a little summary of this thing in the mid-60s. The first case was decided in 1970. That's not right. [In] 1967 Judge [Alexander] Holtzoff [phonetic] -- I should write a book about this case. Judge Holtzoff was a peppery little brilliant little man who jumped up and down on the bench. He was outraged by the notion that it was unlawful for the District Government to embark on this. He just blew us out of the courtroom. We got him reversed. His first decision was 1967, and he was reversed in 1968.

Schrag: Then Congress stepped in.

Owen: Then Congress passed that infamous effort to change it.

Schrag: Then it goes on. I guess the denial of cert is in early '72. So throughout this five-year period, were

you -- for the most part, did you think you would win eventually?

Owen: The denial of cert was in ’72, but you’ve got to remember -- to a lawyer this is important; I don’t know whether it is to you -- but two quite separate litigations. Chapter I, as you say, we won and Congress tried to overrule that decision. Then Chapter II, we went to Sirica. He threw us out. We went to the Court of Appeals. They said, “No, no. Go back to Sirica. He’ll try the case.” He tried the case and found three violations of federal law. We appealed, saying, “He’s wrong about that. There are not just three. There are eight.” The government appealed as against the three. The Court of Appeals said that we were right, there were eight violations of federal law.

Schrag: The Court of Appeals splits three ways, right? There is [David L.] Bazelon who says, “You’re right down that list.” There’s a dissent and then there’s a concurrence that was in between, as I recall. I don’t have this --

Owen: I haven’t looked at the concurrence in a long time. There was a dissent by [George E.] McKinnon who

thought it was outrageous that citizens should have anything to say in such matters, such high policy matters. He was a former member of Congress and was very unsympathetic to them. I've forgotten the concurrence, but I think the concurrence went along with the eight rulings of Bazelon.

Schrag: I'll have to look this up. I think not. I think it was not all of them. Obviously the effect was --

Owen: Okay. I may have forgotten. Fahy was the concurring judge. I haven't looked at this decision recently.

Schrag: I'm trying to get the big picture and not -- that is, I'm not writing a book about the Three Sisters bridge. I'm trying to get the key elements.

Owen: Let me just finish the story. After that, then the government asked for certiorari, which was just a ridiculous request. The Supreme Court was never going to take that case. And the chief justice wrote his famous dissent from the denial of certiorari -- unprecedented, never happened before practically. In it he said cert should be granted and this bridge should be -- that this result should be turned over on the merits. Here was a man, chief justice of the United States, who had never heard an argument about

it, but he had already made up his mind. That's a side story.

Schrag: No, that's good. I think I missed that part.

Owen: That was scandalous what he did.

Schrag: Do you have any idea -- I guess this was just such a polarizing issue at the time that it's very hard to find middle ground when there is --

Owen: Yes. And Republican and Democratic tensions were running all the way through here. [Warren] Burger hates or did hate Democrats.

Schrag: But Natcher and Kluczynski were Democrats.

Owen: That's true, but they were southern Democrats.

Schrag: No, Kluczynski was from Chicago, right?

Owen: I guess. I don't know.

Schrag: I don't understand. Maybe you can persuade me, but I'm not quite sure that's the story. Natcher, yes. Natcher was a southern Democrat in a completely safe seat, represented no one but himself, as far as I can tell.

Owen: I should have said, as far as the judiciary were concerned, it was a Republican-Democratic split. Everybody who voted for us was a Democrat; everybody

who voted against us was a Republican, among the judges.

Schrag: I didn’t realize that.

Owen: Burger was the quintessential Republican, Mr. Republican. If you trace it through -- well, Sirica was a dyed-in-the-wool Republican, and he disliked Democrats.

Schrag: But eventually he gave you three violations, you said.

Owen: Yes.

Schrag: After you pointed out that he’d have trouble to getting to work. Was he on the Maryland or DC side of Macarthur Boulevard.

Owen: He was on the DC side. That was a great scene. I was trying to figure a way to let him know that he couldn’t drive to work. I couldn’t figure out how to do it, given his rules of evidence. At one point I requested a conference at the bench so the rest of the courtroom couldn’t hear it. The government lawyers and I went up there. I started to lay out some maps and said, “Judge, I think you need to understand this.” I was going along and I was interrupted by one of the government lawyers who

said, “Ha, ha, ha. Judge, I see what he’s trying to do. He’s trying to persuade you that you will not be able to drive to work if the bridge is built,” which, of course, was precisely the point I was trying to make. The judge looked absolutely stunned and said, “Twenty-minute recess,” disappeared with his clerk to go out and figure out whether -- [Laughter]. Then the case was over. This is all outside of your interest.

Schrag: No. This is why it’s important to get into the public record, so when the book does get written -- because, you know, this is how history happens. It’s that twenty-minute session alone with the maps. There are some people -- and a lot of the actors in this case did, as I said, get involved because it was going to go through their house. Peter Craig -- the Northwest Freeway wasn’t going to go right through his house; it was going to go three blocks away. He’d have a six-lane freeway. It’s very easy to understand his idea. For other people like you and Natcher, it seems to be more a question of the process -- would it be the House of Representatives and the House Appropriations Committee with its power in place, or would it be the angry citizen

able to bring the federal officials, the public servants, to heel.

Schrag: So with Sirica -- it’s important to place people’s motivations.

Owen: He changed positions. He became a Peter Craig.

Schrag: So in this five-year period from ’67 to ’72, for the most part did you think you would actually win or did you think that you were just stalling until something else could be worked out? Or were there moments of reversal?

Owen: Obviously there were ups and downs during the case when we were thrown out peremptorily by Holtzoff. That was not an auspicious beginning. Your spirits rise and fall. But we were pretty well convinced that we had a damn good case of a kind that no one had ever presented before. The further we got into the facts, the more convinced we became that ultimately we had to win.

For example, the Secretary of Transportation is supposed to make a particular kind of determination with respect to transportation planning. He hadn’t even thought about that issue when he approved the bridge. We asked for all documents relating to his decision on

this issue, and there were no documents. Then three weeks later or whatever, the government produced the document which had been written after our case had been filed, which said, “Dear Mr. Secretary, here is the decision that you made back then. These are the reasons you made it.” The secretary signed it. It was fraud -- outright fraud. When that occurs, suddenly your spirits rise and you think you really are going to win the case ultimately. When I say “fraud,” that’s a little too strong.

Schrag: He didn’t backdate it.

Owen: No, they didn’t backdate it.

Schrag: Which for the [Richard M.] Nixon administration is pretty good. [Laughter].

Owen: That’s true. But it was a total phony.

Schrag: You deposed [John A.] Volpe.

Owen: At length.

Schrag: He’s an odd character in that he was not this crazed highway builder. He had this family contracting business, but in New Orleans and elsewhere seemed somewhat open to complaints and questions and thoughts that not every freeway was worth building.

Do you have any personal memories of him or reactions?

Owen: He was governor of Massachusetts, as you know. I have to say in all candor, I don’t think he was a very bright man, but he wanted very much to be in a position of power. When he got the opportunity to become Secretary of Transportation, he jumped at it. We somehow -- I’m surprised a little by this -- but we somehow persuaded Sirica to let us take his deposition. But Sirica, who felt allied with Volpe on the eve of trial, he announced that he considered Volpe a good Italian-American like himself. He announced his sympathies. We persuaded Sirica somehow to let us take the deposition of Volpe. We thought that Sirica said, “Since he’s a very distinguished Italian-American and a cabinet secretary, you’re going to have to go to his office and you can depose him only by written interrogatories. You can’t ask him follow-up questions, and there will be no follow-up, no cross examination.”

So we all trooped over to the fellow’s office. He was sitting in a huge chair, and the servant came in with a glass of sherry. The court reporter read

aloud these written questions, which he then gave expansive answers to. We were not allowed to follow-up at all. He just -- someday you ought to read his deposition. It’s just absolute hogwash. [Laughter]. Then I cross examined him at the trial using some of his deposition answers. You came away from the thing with an impression of not total incompetence but something approaching it -- a very sloppy understanding of his duties. His feeling was, “Look, the government has made a decision. Nobody should be able to challenge this. This is ridiculous.” You asked him specific questions about “did you do this or did you do that.” He would say, “I don’t really remember. A secretary of the cabinet doesn’t have to remember details like that.” It was a very cavalier attitude toward the law and his obligations.

Schrag: Do you think that was a realistic law, with a 40,000-mile interstate system? I guess the law only applied to park lands and historic sites and the other environmentally-sensitive whatever that list was. So maybe it was not unrealistic to ask a Secretary of Transportation --

Owen: It’s not unrealistic. Furthermore, if it is unrealistic, tell Congress to change the statute, but they have a statutory obligation.

Schrag: In practice, I imagine that Volpe’s people, such as [Francis] Turner in particular, were the ones who were making these decisions.

Owen: Yes. But the secretary, by law, is required to make the decision. He delegated everything. He didn’t know squat about what was happening.

Schrag: That’s very helpful.

Owen: Until the lawsuit was brought, and then he was in the difficult position of having a statutory responsibility to have made some decisions which he didn’t in fact make. He had to sort of blather his way through that.

Schrag: Okay. You know, when someone changes their position it could be that he sat down with all the evidence and considered it carefully, or it could be that he wasn’t directly involved the first time and it’s a more departmental thing. That’s very helpful to clear up. Now, [Thomas] Airis, who was the head of the DC Highway Department, he must have been much

more focused on what was actually happening because he was a real detail man.

Owen: Yes. He was a detail man. My recollection of him is much hazier than these other people, partly because he was more involved in the first suit than the second. I think we had him as a witness in the second case. But he was not responsible for the federal violations, and therefore he was not as important a figure in the major litigation, the second go-round.

Schrag: Were there any big surprises in the whole process that stand out?

Owen: There were lots of surprises as went along. [Laughter]. When the government manufactured phony documents we were surprised. When the bridge model -- we learned that the bridge model collapsed. That was wonderful. We learned that in the middle of the trial, that they had built -- this was going to be the world's longest single-span, pre-stressed concrete bridge -- a thing of beauty. They set up a model wherever it was at the Federal Highway Administration, and the damn thing collapsed. [Laughter]. For a trial lawyer, that was just manna

from Heaven. That was a surprise. I was surprised, frankly, when Bazelon bought -- lock, stock, and barrel -- our sort of bribery argument.

Schrag: Right. I think that's where [Judge Charles] Fahy said, "Natcher can do whatever he wants. That's just fine." That may have been the split between the two.

Owen: It may have been. Fahy wasn't [unclear] early on. Of course, McKennon had been in Congress, so those two guys thought it was just outrageous. I personally thought we had a terrific argument, and I was delighted when Bazelon bought it. But it was a surprise, because everybody told us that we were making an argument that couldn't possibly win. We just decided to go ahead with it anyway and shake the tree and see what falls off. We shook it, and it did. Then when the chief justice wrote his dissent, that was a surprise. There were lots of nice surprises.

Schrag: In terms of Metro funding actually, the key event is in between those two. It's when the Court of Appeals refuses to go en banc. That news comes in in the morning, and a couple of hours later Natcher is defeated on the floor of the House.

Owen: You can remember. You've got these details down.

Schrag: Well, I can look it up.

Owen: I cannot remember that.

Schrag: I just wanted to know if after Bazelon's decision came down, did you expect the Court of Appeals to go en banc or do you have any memories of what you expected?

Owen: I don't remember having any expectations one way or the other. I guess -- if I try to reconstruct my mental attitude back then, I guess I would have bet that they would go en banc. I guess I probably was surprised that they did not and a huge sigh of relief, too.

Schrag: Do you remember any moment when you said, "I think we've actually won it now. This is it and it's not going to go again."

Owen: It was a tremendous victory to persuade the trial judge there were three violations of federal law, a dyed-in-the-wool Republican. That was a huge victory.

Schrag: That was a great climactic victory.

Owen: Yes. From then on, it just looked like easy sailing. We couldn't lose, and we could win some additional points as well, which happened. At both stages there was -- well, of course, there was a great celebration when we won in the first litigation, too, the Airis case. I guess, looking back on it, I guess I thought my role was over when that happened. I did not anticipate that a special statute would be written to overturn that or intending to overturn.

Schrag: But once that statute came out, was there any hesitation to say, "Let's throw a few more thousand dollars at it."

Owen: Not really. I was personally committed, and I'm not sure that the law firm thought it was a good idea for us to keep on spending pro bono hours, but there was no way they were going to turn us off.

Schrag: Craig also thought, I think, at some point that the firm was worried it was annoying clients by taking this anti-highway position. I don't know if you --

Owen: Nobody ever suggested that to me -- nobody. I guess I may have heard -- I think we may have heard -- particular lawyers may have come to me in the firm and said, "I've got a client who's in the car

business and he doesn't much like this." My reaction to that is, "So what? We've got an obligation to each client, and we're going."

Schrag: When did it end?

Owen: I guess it ended with the chief justice's final little blurt.

Schrag: Did Congress -- the bridge stays on the map until '75 or something, and Congress was still putting it in the highway acts. I just don't think anyone cares anymore after that.

Owen: But there was a court injunction against it, so they couldn't do a damn thing.

Schrag: That was posturing.

Owen: I'm trying to think whether there was any [unclear] of interest. It became easier for me to stop other highway projects as a result of that. There was one not very long ago here where we were able just to go down and talk to the general counsel at the Department of Transportation and say, "If you go ahead with this project, we will sue you." And they dropped the project.

Schrag: Which project was that?

Owen: It's called the Barney Circle Project. It was to build a bridge across the Anacostia River through Anacostia Park. It was another one of these things where the Federal Highway Administration sees a nice piece of park land and they think they can improve the traffic flows of the District, so let's pave it over. But that is not going to happen much [unclear].

Schrag: Were you personally involved with the Wilson Bridge litigation?

Owen: No, not at all.

Schrag: Covington and Burling keeps on coming back, so I thought I'd ask. That's a later chapter. Well, I think that's all the prepared questions I've asked. If you think there's anything I've missed --

Owen: No, I don't think you've missed anything. It's a question of your own interest. I told you pretty much -- there are a lot of sea stories about the trial, but you're more interested in Metro. You're not interested in the litigation itself.

Schrag: Yes, but the thing is Metro is on a sort of parallel -- the thing about Metro is that at the same time there is this fight about who plans highways, there

is also this debate over who is going to plan transit. So in these very same years, there is this devolution from a federal transit agency and a federal planning body to a local transit agency and a local planning body, the Council of Governments. You have the creation of the Department of Transportation which, I think, in part was designed to avoid these sorts of disasters, because when highways were done by the Commerce Department there was no sense of balancing them with transit or anything else. It was just build, build, build. The way I see it is that from -- the way this chapter works is that it goes from ’66 to the end of ’71. A lot of sort of similar issues about how transportation is done show up on both sides, on highways and rail. I obviously need to get the Three Sister bridge story as correct as I can, because it added hundreds of millions of dollars to the cost of Metro -- Natcher’s blackmail. There’s no other way about it.

Owen: That’s true. I believe it to be true. I don’t think it had ever occurred to anyone that that kind of blackmail, the kind that Natcher engaged in, could be challenged judicially. We did, as I think I

mentioned earlier, take a certain amount of flak from people about the audacity of the argument. I still get noise from judges and former members of Congress about how what an outrageous position we persuaded Bazelon to take, that it's simply unthinkable that the courts should sit in judgment on the relationships and the negotiations between Congress and the federal establishment.

Schrag: I'm surprised that he courts weren't outraged by the Kluczynski amendment overturning their action.

Owen: No, I don't think so. You know, this was not a cause that the good judges of this jurisdiction cared that much about. I think Bazelon got interested when we got him involved and showed him what these federal officials were doing. But I don't think that -- I withdraw that. I have never seen any indication that any of the judges in this area were upset by the fact that Congress tried specifically to overrule the decision of the court. I'm not sure I can explain why there wasn't any outrage.

Schrag: I was just thinking of the Miranda case, which some analysts have explained as the court, the Supreme Court in particular, guarding its own power against

congressional legislation, because there you have the same kind of thing -- comparable anyway. Maybe I misread the DC courts. Did you have any contact with Justice Douglas, by the way? He would be the one person who --

Owen: No. I met him a few times but never had --

Schrag: Again, just that personal interest in the canal and the river.

Owen: I never -- right. He would have been on our side.

Schrag: I'm sure he would have. I don't know when I can dig up that story. I imagine he would have been very eager to deny cert to the federal government. Okay. Thank you very much.

Owen: My pleasure.

[End of Interview]

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